REMARKS

Claims 1-54 are pending in the application. Claims 6-9, 15 and 16 have been withdrawn.

Double Patenting

The Examiner has rejected claims 1-5, 10-14, 17-22, 24-30, 37-44 and 51-54 on the basis of nonstatutory obviousness-type double patenting as unpatentable over claims 1, 3, 4, 6, 8, 11, 13, 15 and 17 of US Patent No. 6,566,585 ('585). The Examiner alleges that the instant claims are not patentably distinct from the listed claims of '585 patent because the working examples that enable the '585 are the embodiments claimed in the instant application and are therefore disclosed in patent '585 as the exemplified embodiments of the invention. Applicants respectfully traverse.

The doctrine of double patenting seeks to prevent the unjustified extension of patent exclusivity beyond the term of a patent. MPEP 804. Double patenting results when the right to exclude granted by a first patent is unjustly *extended* by the grant of a later issued patent or patents (emphasis added). *In re Van Ornum*, 214 USPQ 761 (CCPA 1982). "Nonstatutory-type" double patenting is based on a judicially created doctrine grounded in public policy and is primarily intended to prevent *prolongation* of the patent term by prohibiting claims in a second patent not patentably distinguishing from claims in a first patent (emphasis added). MPEP 804.

Applicants first point out that the '585 patent has a filing date of May 25, 2000. This is after the filing date of October 9, 1999 for the parent application on which the instant application is based. Consequently, the patent term of the instant application would end before the patent term on the '585 application. Thus, there would be **no extension of patent protection** for the subject matter claimed in the '585 application.

In addition, the claims of the present application are not anticipated by the claims of the '585 patent. The '585 patent claims do not disclose the specific sequence of the branching enzyme claimed in the present application. Double patenting rejections must be based on the language of the ***claims*** in the patent, the patent disclosure may not be used as prior art. *In re Vogel and Vogel*, 164 USPQ 619, 622 (CCPA 1970). The claims in the instant invention are directed to a particular branching enzyme nucleic acid sequence while the claims of the '585

patent are directed to transgenic plant cell. These are not obvious variant on one another. As a consequence, the instant claims are both novel and unobvious over the '585 application.

In view of the above, Applicants submit that the obviousness-type double patenting rejection is improper and therefore respectfully request removal of the rejection.

It is believed that this application is now in condition for allowance, and early action to that effect is respectfully requested.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Susan W. Gorman, Reg. No. 47,604 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

Pursuant to 37 C.F.R. §§ 1.17 and 1.136 (a), Applicant respectfully petition for a two (2) month extension of time for filing a reply in connection with the present application. The Commissioner is hereby authorized to charge Deposit Account No. 02-2448 in the amount of $460.00.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.14; particularly, extension of time fees.

Dated: March 10, 2008

Respectfully submitted,

#47,604

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